

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:18-cr-00221-MMD-DJA

v

Plaintiff,

JAMES WILLIAMS, JR., et al.,

ORDER

Defendants.

I. SUMMARY

The jury returned a guilty verdict against Defendant James Williams, Jr. on one transaction of False Statement During Purchase of a Firearm charged in count one. Before the Court is Williams's Motion for Judgment of Acquittal Under Fed. R. Crim. P. 29(c) and Alternative Motion for a New Trial Under Fed. R. Crim. P. 33 ("Motion")¹. (ECF No. 141.) For the reasons discussed below, the Court denies the Motion.

II. RELEVANT BACKGROUND

Williams was indicted on two counts: False Statement During Purchase of a Firearm in violation of 18 U.S.C. § 924(a)(1)(A)² (count one) and Illegal Acquisition of a Firearm in violation of 18 U.S.C. § 922(a)(6) and 924(a)(2) (count two). (ECF No. 85.) Count one enumerated 13 transactions between May 25, 2017 and May 26, 2018 where Williams knowingly stated on ATF form 4473 (“the Form”) that his “place of residence was a physical address in Las Vegas, Nevada, to wit: 6389 Brianna Peak Ct.” when in truth he

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¹The Court has reviewed the government's response (ECF No. 143) and Williams's reply (ECF No. 144).

²Williams's co-defendant Taisia Soloai Fauolo is indicted on one count of illegal receipt of a firearm by person under indictment (count three). (ECF No. 85.)

1 did not reside there³. (*Id.* at 1–2.) The jury convicted Williams of only the last transaction—
2 the May 26, 2018 transaction (“May 2018 Transaction”—in count one; and found him not
3 guilty as to the first 12 transactions in count one and as to count two.

4 **III. LEGAL STANDARD**

5 **A. Acquittal Under Rule 29**

6 The test for denial of a judgment of acquittal pursuant to Fed. R. Crim. P. 29 is the
7 same as the test for reviewing a claim that the evidence is insufficient to support a
8 conviction. See, e.g., *United States v. Tucker*, 641 F.3d 1110, 1118–19 (9th Cir. 2011);
9 *United States v. Abner*, 35 F.3d 251, 253 (6th Cir. 1994). A criminal defendant’s challenge
10 to the constitutional sufficiency of evidence to support a criminal conviction is governed by
11 *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *Jackson* requires a court, upon such a
12 motion, to construe the evidence “in the light most favorable to the prosecution” to
13 determine whether “any rational trier of fact could have found the essential elements of
14 the crime beyond a reasonable doubt.” *Id.* (emphasis in original).

15 **B. New Trial under Rule 33**

16 Pursuant to Fed. R. Crim. P. 33(a), “[u]pon the defendant’s motion, the court may
17 vacate any judgment and grant a new trial if the interest of justice so requires.” Although
18 determining whether to grant a motion for a new trial is left to the district court’s discretion,
19 “it should be granted only in exceptional cases in which the evidence preponderates
20 heavily against the verdict.” *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981)
21 (citation and internal quotation marks omitted). Moreover, the defendant bears the burden
22 of persuasion. *United States v. Endicott*, 869 F.2d 452, 454 (9th Cir. 1989). Such an
23 extraordinary remedy is appropriate, for example, when a court makes an erroneous ruling
24 during the trial and that, but for that erroneous ruling, the outcome of the trial would have

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27 ³The elements for count one are: (1) the defendant knowingly made a false
28 statement or representation; and (2) the statement pertained to information required by
law to be kept in the records of a person licensed as a firearms dealer, importer,
manufacturer, or collector. See 18 U.S.C. § 924(a)(1)(A).

1 been more favorable to the defendant. See *United States v. Butler*, 567 F.2d 885, 891 (9th
2 Cir. 1978).

3 **IV. DISCUSSION**

4 Williams renews his Rule 29 motion raised at the close of the government's case
5 and asserts additional arguments in support of his Motion. The Court will address each
6 argument in turn.

7 **A. Claimed Insufficient Evidence to Support Conviction as to May 2018
8 Transaction**

9 Williams contends that because the only difference between the May 2018
10 Transaction and the first 12 transactions was evidence of AFT Special Agent Gregory
11 Painton's March 2018 phone conversation with Williams, the jury must have drawn an
12 unreasonable inference as to Williams's knowledge. (ECF No. 141 at 9–12.) But as the
13 government correctly points out (ECF No. 143 at 5–7), the Court does not examine
14 whether the jury's verdict is consistent so long as there is sufficient evidence to support
15 the verdict. See *United States v. Powell*, 469 U.S. 57, 58 (1984)⁴ (acknowledging that "a
16 criminal defendant convicted by a jury on one count could not attack that conviction
17 because it was inconsistent with the jury's verdict of acquittal on another count") (citing
18 *Dunn v. United States*, 284 U.S. 390 (1932)).

19 Here, the Court finds that sufficient evidence supports the verdict. First, the Court
20 agrees with the government that additional evidence, not just Painton's testimony as to
21 the March 2018 phone conversation with Williams, distinguishes the May 2018
22 Transaction from the previous transactions. (ECF No. 143 at 7–9.) Specifically, the
23 government offered the following evidence in connection with the immediately preceding
24 transaction on January 18, 2018 ("January 2018 Transaction"): Williams purchased four
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27 ⁴In *Powell*, the government did not dispute the contention that the jury's verdict —
28 acquitted defendant of conspiracy to possess cocaine and possession of cocaine, but
finding her guilty of using the telephone to facilitate those offenses — was inconsistent.
284 U.S. at 479. However, the Court declined to create an exception to the established
rule in *Dunn*, even though the jury's verdicts "cannot be rationally reconciled." *Id.*

1 firearms at Ventura Munitions; Williams walked out of Ventura Munitions with a Glock bag
2 and two hard case firearms cases; Williams walked over to a gas station next door where
3 he was picked up in a black Jeep; Jeep drove to a residence where an individual later
4 identified as Taisia Sololai Fauolo, a prohibited person, took the bad and hard cases from
5 the Jeep into the house; Fauolo then returned to the Jeep's passenger side door and
6 appeared to hand something through the window; and agents located the four firearms in
7 a subsequent search of that residence. (ECF No. 139 at 101–14.) During the March 2018
8 telephone conversation with Painton, Williams "said he still lives in town, but wouldn't give
9 [Painton] any specifics" in response to Painton's question about Williams's residence. (*Id.*
10 at 118–19.)

11 Viewing the evidence as to the January 2018 Transaction and Painton's March
12 2018 call with Williams in the light most favorable to the government, the jury could
13 reasonably find that Williams knowingly provided a false statement relating to his place of
14 residence in connection with the May 2018 Transaction. The jury could have also found
15 that Williams may have mistakenly left that address on the form before the January 2018
16 Transaction, but that his continued use of that address after the March call, was no longer
17 a mistake.⁵ Said differently, the jury could have reasonably inferred that because Painton
18 asked Williams about where he resides, Williams's continued identification of the Brianna
19 Peak Ct. address was not due to a mistake.

20 Williams argues that the jury could not have drawn any inference from the January
21 2018 Transaction because there was no evidence that Williams was aware that ATF had
22 seized the firearms in question. (ECF No. 144 at 5.) But the jury could have reasonably
23 inferred that Williams was aware of ATF's investigation based on the March 2018 call with
24 Painton. As noted, based on the March 2018 call and the January 2018 Transaction, the
25 jury could have reasonably concluded that Williams did not purchase the firearms in
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⁵Antoine Meeks testified that he moved into the Brianna Peak Ct. in the summer of
28 2017 and has two other roommates, but Williams has not lived there. (ECF No. 138 at
118-21.) Meeks also testified that Williams had mail and magazines sent to that residence.
(*Id.* at 122.)

1 question for himself and from that find circumstantial evidence of Williams's knowledge
2 that his statement as to his residence in the May 2018 Transaction was false.

3 **B. Claimed Duplicity of Count One**

4 Williams argues that count one improperly joins 13 separate transactions and is
5 therefore impermissibly duplicitous. (ECF No. 141 at 12–13.) The government counters
6 that Williams waived this argument by not raising it before trial and any duplicity was cured
7 by the use of the Special Verdict Form and the Court's instruction to the jury. (ECF No.
8 143 at 9–10.) The Court fully agrees with the government.

9 Williams waived any argument that count one was defective by improperly joined
10 separate offenses because he did not raise this objection before trial. See *United States*
11 *v. Gordon*, 844 F.2d 1397, 1400 (9th Cir. 1988) (“Fed. R. Crim. P. 12(b)(2) requires that
12 defenses and objections based on defects in the indictment be raised prior to trial.”).

13 Moreover, the Court did ensure that the jury verdict was unanimous. The Special
14 Verdict Form specifically instructed the jury that if the jury found Williams guilty of count
15 one, “you must identify below each statement that you unanimously agree was knowingly
16 false (check all that apply).” (ECF No 132 at 1.) The only statement that was checked was
17 the statement made in the May 2018 Transaction. (*Id.* at 2.)

18 “One vice of duplicity is that a jury may find a defendant guilty on a count without
19 having reached a unanimous verdict on the commission of a particular offense.” *United*
20 *States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976). That risk was alleviated by the
21 Special Jury Form. Indeed, the verdict shows the jury followed the form and instruction—
22 they found Williams guilty only as to one transaction in count one.

23 **C. Alleged Comment on Williams's Decision Not to Testify**

24 Williams contends the government engaged in misconduct during closing by
25 improperly commenting on Williams's decision not to testify. However, because Williams
26 appears to be making two different arguments in his Motion and reply, the Court is
27 compelled to recite both arguments for comparison. The following sums up the argument
28 in the Motion:

Here, the government impermissibly commented on Mr. Williams's decision not to testify during its closing argument when it referenced Mr. Williams's statements about his residence during his phone call with Painton. The government's closing argument emphasized the fact that Mr. Williams continued to purchase firearms after the March 2018 phone call with Painton. The government drew attention to Painton's testimony about the March 2018 phone call. Yet, the only person who could have refuted these statements about his residence was Mr. Williams, the person on the other end of the phone.

(ECF No. 141 at 14.) The government disputes that this argument was made in closing, pointing out Williams' failure to provide any citation to the transcript. (ECF No. 143 at 10.) In the reply, Williams's argument appears to have changed as best that the Court can discern, though Williams cited to the transcript:

In its closing argument, the government emphasized Painton was unable to contact Mr. Williams because the listed phone numbers were not working. The inference the government wanted the jury to make was that Mr. Williams did not have working phone numbers because he did not want to be found. Trial Tr. Day 3 7:7-8. The only person who could have explained why the phone numbers were not working was Mr. Williams. By highlighting Painton's inability to contact Mr. Williams, the government impermissibly commented on Mr. Williams's decision not to testify. Afterall, the only person able to refute the government's narrative about Mr. Williams's motivations was Mr. Williams.

(ECF No. 144 at 6.) Under either scenario, Williams's contention is that the government's recitation of Painton's testimony that he tried to contact Williams impermissibly commented on Williams's silence.

9 This argument is tenuous at best. The government did not point out that Williams
0 failed to dispute Painton's testimony or that there was no evidence to refute Painton's
1 testimony to even whisper as to Williams's silence. The government's recounting of
2 Painton's admitted testimony—about his attempt to contact Williams and his call with
3 Williams—was not improper and does not amount to impermissible comment on
4 Williams's decision not to testify.

D. Claimed Error in Rejecting Williams's Proposed Special Jury Instruction No. 1

Williams reiterates his argument in support of his proposed special instruction no. 1 to include the added language about the “current residence address,” contending that

1 Form 4473's definition of "current residence address" is uncleared. (ECF No. 141 at 15-
2 17.) The relevant part of that proposed special instruction as to count one reads:

3 Specifically, the indictment alleges Mr. Williams listed "6389 Brianna
4 Peak Count, Las Vegas, Nevada 89142" as his current state of residence
5 and address on ATF Form 4473 when he knew he did not reside at that
6 address.

7 For the purposes of ATF Form 4473, a person's "current residence
8 address" is the State and street address where an individual resides. For
9 example, an individual resides in Nevada if he or she is present in Nevada
with the intention of making a home in Nevada.

10 It is possible for a person to have two or more residences. For
11 example, if an individual is purchasing a firearm while staying at his part-
12 time home in Nevada, he is a resident of Nevada for the purposes of ATF
13 Form 4473.

14 (ECF No. 119 at 37.) The Court rejected Williams's proposed instruction and adopted the
15 government's proposed special instruction no. 3 (*id.* at 35) which includes only the
16 elements of count one but not the recited examples that Williams included. The Court
17 found that the government's proposed instruction accurately reflects the elements of the
18 offense while Williams's proposed instruction improperly advances his theory of the case,
19 particularly in the examples included in the proposed instructions. (ECF No. 137 at 149.)
20 Indeed, the verdict reflects that the jurors understood the term "current residence address"
21 on Form 4473.

22 In sum, the Court disagrees that it erred in rejecting Williams's proposed special
23 instruction no. 1 to warrant a new trial.

24 **V. CONCLUSION**

25 The Court notes that the parties made several arguments and cited to several cases
26 not discussed above. The Court has reviewed these arguments and cases and determines
27 that they do not warrant discussion as they do not affect the outcome of the issues before
28 the Court.

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1 It is therefore ordered that Williams's Motion for Judgment of Acquittal Under Fed.
2 R. Crim. P. 29(c) and Alternative Motion for a New Trial Under Fed. R. Crim. P. 33 (ECF
3 No. 141) is denied.

DATED THIS 27th day of January 2020.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE